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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT WADE HITCHCOCK, Defendant and Appellant.	A154199 (Lake County Super. Ct. No. CR944311)

Following the denial of his motion to suppress, defendant Robert Wade Hitchcock entered a plea of no contest to driving under the influence of a controlled substance causing injury (Veh. Code, § 25153, subd. (e).) and to the special allegation that he personally inflicted great bodily injury during the commission of that crime. (Pen. Code, § 12022.7, subd. (a).) He contends that the drug evidence seized from his vehicle was obtained during an unlawful warrantless search, and the trial court erred in denying his motion to suppress. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken from the hearing on the motion to suppress. We describe only the evidence related to the issues on appeal.

Around 4:45 p.m. on September 28, 2016, defendant crashed his truck into another truck, pinning a pedestrian. Law enforcement arrived within minutes of the crash. One of these officers, California Highway Patrol (CHP) Officer Zerbel, began looking for witnesses. He spoke to the person closest to him, who happened to be defendant, and asked if he had seen what happened. Defendant responded, "Yeah, I did it. I hit her."

Defendant had red, watery eyes and appeared visibly upset. Defendant said that he had fallen asleep, and the last thing he remembered before the crash was seeing the fire station. He only woke up when he heard the crash and saw the pedestrian in front of his vehicle.

A few minutes later, Zerbel asked defendant for his identification. As he handed Zerbel his license, defendant explained that it was "suspended," a fact that Zerbel then confirmed through dispatch. In response to Zerbel's question, defendant admitted to drinking one beer an hour and a half before the crash. Defendant submitted to a preliminary alcohol screening (PAS) test around 4:50 p.m. or 5:00 p.m., which showed that he only had trace levels of alcohol.

CHP Officer Geer, who arrived around the time defendant submitted to the PAS test, was tasked with taking photographs of the scene along with CHP Officer Phillips. Geer testified that it was standard CHP practice after any collision where someone was severely injured or died "to go inside of a vehicle, take pictures of seat belt, seat location, speedometer, any of the instruments that are on the dash, as well as . . . any vehicle intrusion on the inside of that vehicle . . . ." Geer and Phillips smelled marijuana as soon as they opened the truck's doors.

Around the same time, Geer and Phillips had also called a tow truck because defendant's truck looked inoperable, and they could not examine the truck to confirm whether it was or was not inoperable. Geer and Phillips began an inventory search of the truck because a civilian tow truck driver would be towing the truck. Geer testified that CHP policy mandated that an inventory be taken "every time" before a vehicle was towed to document "anything left in the vehicle of value or not of value . . . ." to ensure that "everything that was inside the vehicle [was] still there when the owner [got] it back." This policy protected CHP from liability.

Meanwhile, Zerbel noticed that defendant appeared lethargic and possibly intoxicated. At 5:12 p.m., he asked defendant to perform various field sobriety tests (FST's) and a second PAS test. Geer stopped inventorying the items in defendant's truck and filmed defendant's performance on the FST's, which was played at the hearing.

Zerbel testified that defendant was "unable to perform the [FST's] to a satisfactory level," which led Zerbel to believe that defendant was under the influence of something.

After defendant completed the FSTs, Geer and Phillips returned to inventorying defendant's truck and smelled marijuana emanating from a lunch pail or cooler near the passenger floorboard. The officers opened the container and found what was later confirmed to be methamphetamine and a pipe with white residue in a paper bag.

Phillips told the defendant at the scene that he had found methamphetamine and a pipe inside a small bag in a lunch pail in his truck. Defendant claimed that the methamphetamine belonged to a hitchhiker whom he had picked up but admitted that the cell phone, receipts, and other items in the same lunch pail belonged to him.

The trial court found all the witnesses credible. It concluded that Zerbel's initial contact with defendant was consensual; when Zerbel first approached defendant, he thought defendant was just another witness. Defendant volunteered his involvement in the incident and, shortly thereafter, handed over an expired and suspended California driver's license. There was probable cause to arrest defendant for that ground alone.

The trial court also concluded, after listening to the evidence and watching the video of defendant performing FST's, that there was probable cause to arrest him for driving under the influence of a controlled substance. And while law enforcement could have arrested him, they were not required to "instantly arrest him" because they had other important matters to address, including the dead or dying victim and the obstruction of traffic caused by the collision.

The trial court then turned to the inventory search, which it concluded was a proper, "legitimate process." Defendant's truck needed to be inventoried because it was involved in a fatal accident and a private tow truck driver was about to take possession of the truck. The trial court found that the inventory search was necessary to protect everybody, including defendant, from later claiming something valuable was missing. The trial court found that while the officers were conducting the inventory search, they smelled the odor of marijuana that gave the officers probable cause to search for marijuana. The court observed that it would be "poor policy" if inventory searches had to

cease once something incriminating was found. The trial court therefore denied the motion to suppress.

DISCUSSION

With respect to the inventory search exception to the warrant requirement, defendant concedes CHP was authorized to impound his truck, to conduct an inventory search of his truck, and, even in theory, to open containers during that inventory search. However, he claims the warrantless inventory search that led to the recovery of methamphetamine from a closed container in his truck was unlawful because there was no evidence that the officers complied with CHP policy on opening closed containers during the inventory search. Regarding the automobile exception to the warrant requirement, defendant contends that the automobile exception is also inapplicable because his truck was inoperable. We separately address the inventory and automobile exceptions as they apply to this case below.

A. Standard of Review

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) In cases where the facts are essentially undisputed, we independently determine the constitutionality of the challenged search or seizure. (*People v. Balint* (2006) 138 Cal.App.4th 200, 205.) The trial court's ruling may be affirmed if it was correct on any theory, even if we conclude the trial court's reasoning was incorrect. (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529.)

B. Permissible Seizures Under the Fourth Amendment

"Warrantless searches are presumed to be unreasonable ' "subject only to a few specifically established and well-delineated exceptions." ' " (*People v. Evans* (2011) 200 Cal.App.4th 735, 742.) These are " 'exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be

contended that a magistrate's warrant for search may be dispensed with.' " (*People v. Williams* (1999) 20 Cal.4th 119, 126 (*Williams*), citing *Johnson v. United States* (1948) 333 U.S. 10, 14-15.)

A warrantless search of an automobile can be justified on a variety of grounds, including: (1) the search is part of the inventory of a lawfully impounded vehicle (*South Dakota v. Opperman* (1976) 428 U.S. 364, 370-371); (2) probable cause exists to believe the vehicle contains contraband (*Carroll v. United States* (1925) 267 U.S. 132, 149); or (3) the search is incident to a lawful custodial arrest where it is reasonable to believe evidence of the offense for which the individual was arrested might be found in the vehicle (*Arizona v. Gant* (2009) 556 U.S. 332, 335 and 343). "[T]he burden of proving the justification for the warrantless search or seizure lies squarely with the prosecution." (*People v. Johnson* (2006) 38 Cal.4th 717, 723.)

1. Inventory Search

Under the inventory search exception, police may search a lawfully impounded vehicle, including any closed containers within the vehicle, if they follow standard police department procedures and do not conduct the search as part of a criminal investigation. (*Colorado v. Bertine* (1987) 479 U.S. 367, 375.) The requirement that "standardized criteria [citation] or established routine [citation] must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging . . . to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory." (*Williams, supra*, 20 Cal.4th at p. 125, citing *Florida v. Wells* (1990) 495 U.S. 1, 4.) Our courts have rejected claims of purported inventory searches where the evidence does not show the search was conducted in accordance with an established policy or practice governing such searches or indicates the search was conducted for another purpose. (*Williams, supra*, at pp. 123, 138 [prosecution failed to meet burden of showing search was valid inventory search where prosecution failed to establish policy concerning search of closed containers and officers failed to complete inventory, questioning why need to inventory truck "mysteriously evaporate[d]" once officers found drugs]; *People v. Evans*,

supra, 200 Cal.App.4th at p. 743, fn. 5, [search of air vents at impound yard not valid inventory search where not done pursuant to standardized inventory procedure and undisputedly done in effort to discover incriminating evidence].)

Here, is it undisputed that CHP officers had multiple reasons to conduct an inventory search, including the need to impound a vehicle that had been involved in a fatal crash. Moreover, defendant concedes that, "having made a valid decision to impound his truck, the police could conduct an inventory search of that truck pursuant to standardized criteria without running afoul of the Fourth Amendment." (*People v. Green* (1996) 46 Cal.App.4th 367, 375-376 [holding same].)[1]

Defendant only contests that the prosecution did not meet its burden of proving that the officers were following any CHP policy on opening closed containers, noting that the "absence of standardized criteria can be fatal to the search of a closed container found during an otherwise valid inventory search." The testimony at the hearing focused on the existence of CHP's inventory search policy without addressing CHP's policy regarding the search of closed containers. Geer described the policy as "mak[ing] sure that . . . if there is anything left in the vehicle of value or not of value [that] it . . . [is] documented . . . to reduce any kind of liability." But when he was specifically asked whether it was standard practice to search closed containers, Geer testified that it was standard practice for someone inventorying a vehicle who smelled marijuana "to start a search for any kind of illegal substance." Geer explained that the marijuana smell shifted the search from an inventory search to an investigative search, not directly answering the question. The Attorney General disagrees that there was no evidence of a policy on closed containers, but his citations to the record do not supply the evidence.

Given the lack of clarity on CHP's policy concerning closed containers during inventory searches, we cannot conclude the CHP officers were following CHP policy

[1] There was no evidence that the inventory search was a ruse, and defendant does not suggest otherwise. Nor does he challenge the trial court's finding that the officers were credible.

when they opened the cooler. Therefore, the inventory exception does not apply to the opening of the cooler. We next turn to the automobile exception.

2. Automobile Exception

Under the automobile exception, police officers who have probable cause to believe a vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence or contraband could be found. (*United States v Ross* (1982) 456 U.S. 798, 799–800.) An original underpinning of the automobile exception was the fact a vehicle is mobile and therefore can be moved quickly out of the jurisdiction while a warrant is being sought. (*California v. Carney* (1985) 471 U.S. 386, 390.) The Supreme Court has since made clear that ready mobility is not the only reason for the exception (*id.* at p. 391); it also is based upon a lesser expectation of privacy with respect to one's vehicle than one's home. (*Ibid.*) Thus, "[e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception." (*Ibid.*; see also *Cady v. Dombrowski* (1973) 413 U.S. 433, 441–442.) Officers do not need to determine whether a vehicle is operable for the vehicle exception to apply. (*United States v. Hatley* (9th Cir. 1993) 15 F.3d 856, 859 ["[T]he Fourth Amendment does not require that officers ascertain the actual functional capacity of a vehicle . . . to satisfy the exigency requirement"].)

We therefore turn to whether the officers here had probable cause to believe that the vehicle contained evidence of criminal activity. We easily answer yes, a conclusion the defendant does not challenge on appeal. Zerbel observed defendant's lethargic behavior and concluded that he might have been driving under the influence of a controlled substance. Defendant performed poorly on the FST's. Then, as Geer and Phillips were about to begin an inventory search, they opened defendant's truck and smelled marijuana.[2] Defendant does not challenge Geer's or Phillips' credibility or

[2] Defendant contends that the inventory search shifted to an impermissible investigatory search once the officers smelled marijuana. We have found no authority stating that an inventory search morphs into an impermissible investigatory search once

expertise in recognizing the scent of marijuana. He also concedes that "California courts have concluded the odor of unburned marijuana or the observation of fresh marijuana may furnish probable cause to search a vehicle under the automobile exception to the warrant requirement." (*People v. Waxler* (2014) 224 Cal.App.4th 712, 719.) Indeed, this court recently affirmed that the odor of marijuana emanating from a vehicle remains suggestive of criminal activity and can provide probable cause for a search, even after the passage of Proposition 64. (*People v. Fews* (2018) 27 Cal.App.5th 553, 562–563.) The officers therefore had developed strong probable cause to believe that defendant's truck contained evidence that he had been driving under the influence of a controlled substance when he crashed his truck and killed a pedestrian.

Defendant's argument on appeal is that the automobile exception is nonetheless inapplicable here because his truck was no longer operable. But the United States Supreme Court rejected this inoperability argument in *Michigan v. Thomas* (1982) 458 U.S. 259 (*Thomas*). In that case, an officer stopped a vehicle with a 14-year-old driver and a passenger after the vehicle failed to signal a left turn. (*Ibid*.) During the stop, officers observed a bottle of malt liquor on the floor between the passenger's feet and arrested the passenger for possession of open intoxicants in a motor vehicle. (*Ibid.*) The officers issued a citation to the driver for driving without a license. (*Ibid.*) Because no one remained who could drive the vehicle, the officers needed to impound it. (*Ibid.*) The officers searched the vehicle before impounding it and discovered marijuana in the glove compartment and a firearm in the air vents underneath the dashboard. (*Id.* at p. 260.)

The Michigan Court of Appeals held that the warrantless search of the automobile violated the Fourth Amendment. (*Thomas*, *supra*, 458 U.S. at p. 260.) While it recognized that law enforcement could conduct an inventory search of a vehicle before it was towed, it held "the search conducted in [that] case was 'unreasonable in scope,'

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something furnishes probable cause, such as an incriminating smell, during the search. Moreover, as we already indicated, the officers could open the truck doors and search the truck (though perhaps not closed containers in the truck) per CHP policy. The officers were therefore acting lawfully when they smelled the marijuana.

because it extended to the air vents which, unlike the glove compartment or the trunk, were not a likely place for the storage of valuables or personal possessions." (*Ibid*.) The U.S. Supreme Court disagreed and upheld the search under the automobile exception, explaining in part that "[i]t is . . . clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." (*Id.* at p. 261.)

The U.S. Supreme Court's reasoning in *Thomas* is directly applicable to this appeal. Here, officers were not required to seek a warrant merely because defendant's truck was involved in a crash and possibly inoperable. The operability of his vehicle does not impact defendant's lesser expectation of privacy of the contents of his vehicle or the probable cause that existed to search the vehicle, especially once officers smelled the marijuana as they opened the truck. We therefore conclude that the automobile exception to the warrant requirement applies and that the warrantless search was thus lawful under the Fourth Amendment.

DISPOSITION

The judgment is affirmed.

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Miller, J.

We concur:

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Richman, Acting P.J.

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Stewart, J.

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